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JOSEPH F. SPANIOL, JR.
CLERK

NO. 89-1547

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

MICHAEL A. SALMINEN,

Petitioner,

vs.

MARTHA TERRY, as Special Administratrix
of the Estate of Emanuel H. Stein, Deceased;
and First Bank National Association
of Duluth, as Personal Representative
of the Estate of Emanuel H. Stein, Deceased,

Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF MINNESOTA

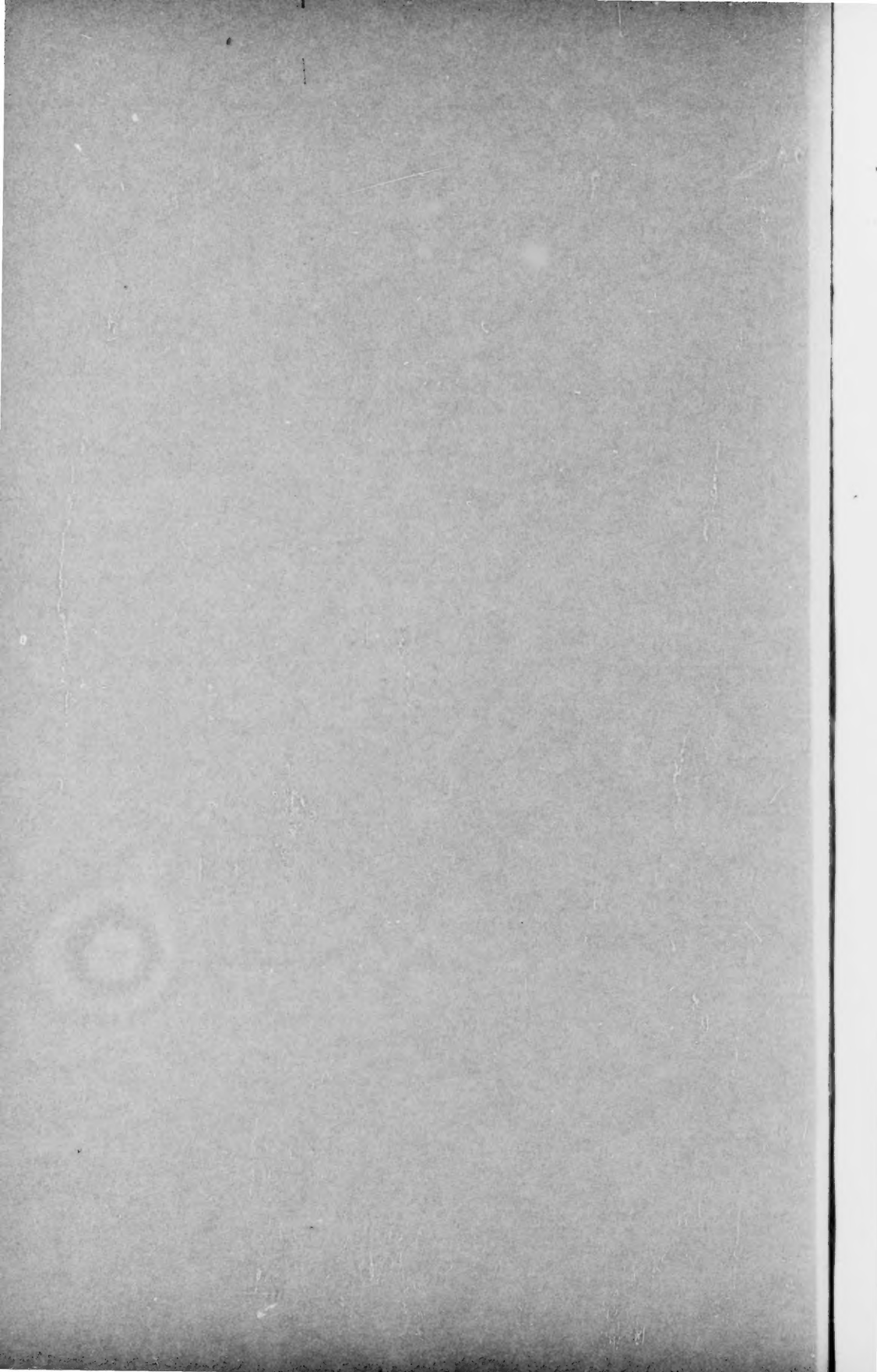
BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The question presented by the Petition for Writ of Certiorari herein is as follows:

Whether the grant of summary judgment in favor of Respondent by the Court below, Petitioner's failure to timely appeal therefrom and the subsequent refusal of the Minnesota Supreme Court to review the dismissal of Petitioner's Appeal constitutes a deprivation of Petitioner's property without due process of law under United States Constitution, 14th Amendment, §1 and 42 United States Code §1983.



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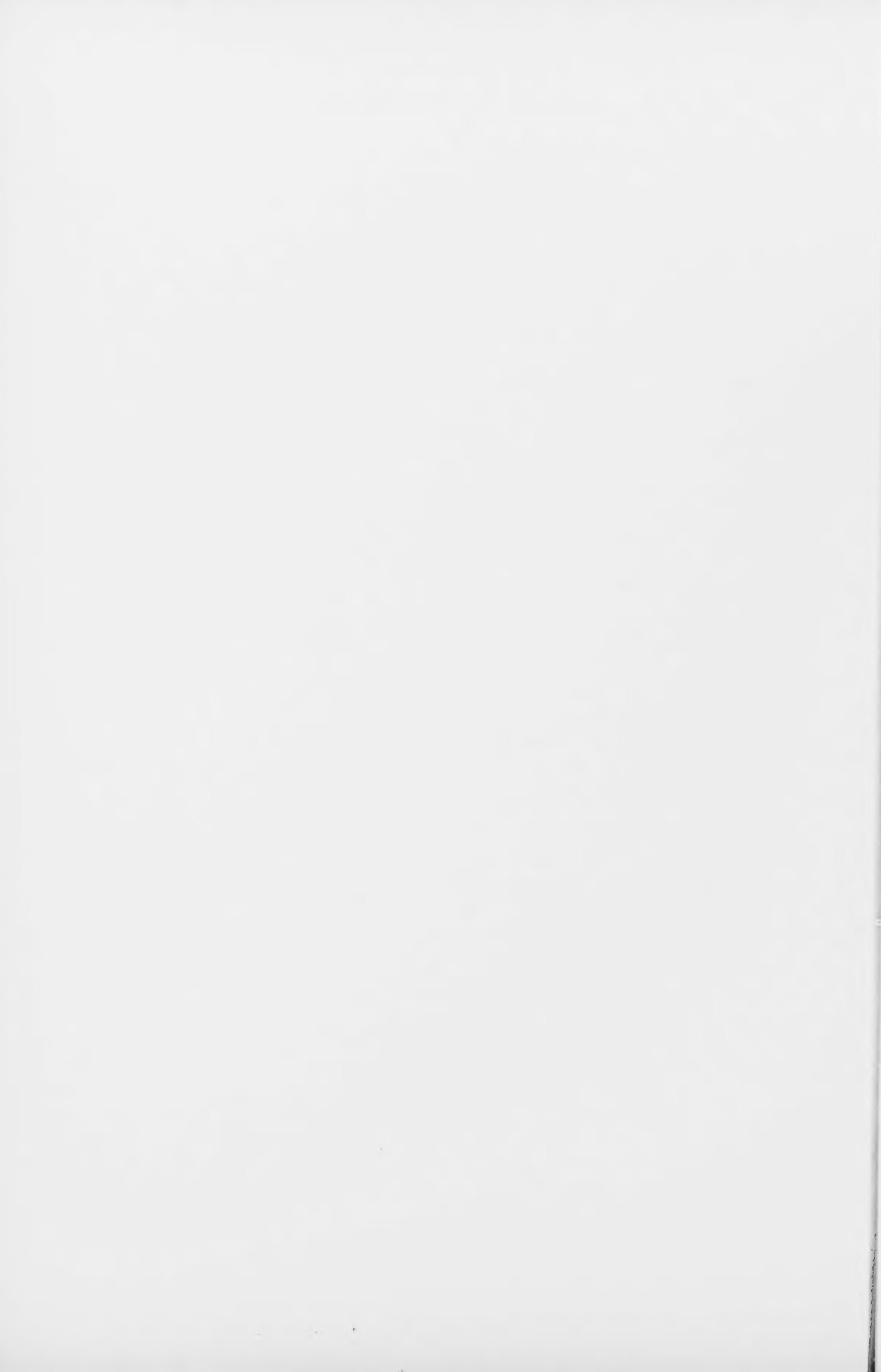


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CONSTITUTIONAL AND STATUTORY
PROVISIONS

United States Constitution, Amendment 14,
Section 1:

No State shall...deprive any person...prop-
erty, without due process of law...

42 United States Code, Section 1983:

Every person who, under color, any statute, ordinance, regulation, custom or usage, of any State...subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights...secured by the constitution and laws, shall be liable to the party injured in an action at law, suit and equity or other proper proceedings for redress.

THE DECISIONS BELOW

Petitioner commenced this action by service of a Summons and Complaint dated April 15, 1988 (Pet. App. A). Petitioner alleged that he had been financially harmed by a conspiracy of persons to conceal prospective business opportunities from Petitioner. Petitioner alleged participation in the conspiracy and fraud by Respondent Emanuel H. Stein (now deceased), an attorney who represented a prospective purchaser of Petitioner's property.

Subsequently, Petitioner brought a Motion to Amend his Complaint to allege punitive damages against Respondents. That Motion was denied. Respondents filed a Motion for Summary Judgment on all claims asserted by Petitioner. On June 1, 1989, the Honorable Joseph R. Scherkenbach entered his Order granting Respondents' Motion in entering judgment on all aspects of Petitioner's claims. (Pet. App. E and F).

On September 8, 1989, more than 90 days after entry of judgment (the appeal period specified in Minn. R. Civ. App. Pro. 104.01), Petitioner moved for relief from the judgment and for a new trial. That Motion was denied by Order dated September 26, 1989 (Pet. App. C).

Petitioner appealed to the Minnesota Court of Appeals from the Order denying his Motion to vacate the Judgment. Observing that the grounds alleged in the Motion to vacate were reviewable by an Appeal from the Judgment, the Minnesota Court of Appeals dismissed Petitioner's Appeal (Pet. App. A). Upon a Petition for Discretionary Review under Minn. R. Civ. App. Proc. 117, the Minnesota Supreme Court denied further review.

ARGUMENT

I. THE DECISIONS BELOW PROPERLY GRANTED SUMMARY JUDGMENT TO RESPONDENTS.

The basis of Respondents' Motion for Summary Judgment and the decision of the Court below was that the Petitioner had not presented any probative evidence to support his claims of conspiracy and fraud. Respondents' Motion and the decision of the Court below were based upon Minnesota Rule of Civil Procedure 56.02, which is identical in all material respects to Rule 56(c) of the Federal Rules of Civil Procedure.

At the Summary Judgment hearing, Respondents demonstrated a complete failure of proof on the part of Petitioner concerning essential elements of his claims. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The Court below made a determination that the proof offered by Petitioner did not demonstrate a

genuine need for trial. Masushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

Because the decision of the Court below represents an appropriate grant of summary judgment to Respondent and, further, because Petitioner failed to take appropriate steps to secure timely reviews of that decision, the Petition should be denied.

**II. THE DECISIONS BELOW DID NOT
DECIDE A QUESTION OF FEDERAL
LAW.**

Petitioner erroneously contends that the decisions below involve considerations of deprivation of due process under U.S. Constitution, Amendment 14, §1 and violations of 42 U.S.C. §1983. (Pet. at 2-3). The decisions below rested entirely on the claims presented in Petitioner's Summons and Complaint; only the allegations of fraud and conspiracy were addressed. Petitioner never asserted any claims that Respondents had deprived him of due process

nor that there had been any violation of Petitioner's rights under color of state law by the Respondents. The language quoted by Petitioner is contained in various documents filed with the Court below, but have never been raised as a direct claim against Respondents. Indeed, Petitioner's complaints of due process violations originated two years prior to the commencement of this action and do not directly name Respondents as culpable actors.

Since no federal question was raised in the Court below, the Petition should be denied.

**III. THE DECISIONS BELOW DO NOT DECIDE
A QUESTION OF FEDERAL LAW IN A
A WAY IN WHICH CONFLICTS WITH
APPLICABLE DECISIONS OF THIS
COURT.**

As stated above, Petitioner did not properly plead or raise issues of deprivation of due process under U.S. Constitution, Amendment 14, §1 or 42 U.S.C. §1983 in the Court below. Even if Petitioner's Complaint is given its most expansive reading, however, the decision below

does not address questions of federal law in a way which conflicts with applicable decisions of this Court.

Petitioner presented no evidence that Respondents engaged in any "state action" under U.S. Constitution, Amendment 14, §1. At most, Petitioner alleges Respondents utilized the Minnesota State Court process to secure a determination of rights and obligations. One who merely avails himself of the applicable state court legal process is not engaged in "state action" for the purpose of U.S. Constitution, Amendment 14, §1. Cobb v. Georgia Power Co., 757 F.2d 1248 (11th Cir. 1985). Lacking even so much as a bare allegation of state action, there is no basis for Petitioner's claim.

Likewise, Petitioner presented no evidence of an alleged violation of his rights secured by the Constitution nor that Respondents acted

under color of state law to secure such a deprivation; both essential elements of Petitioner's cause of action under 42 U.S.C. §1983. West v. Atkins _____ U.S. _____, 108 S.Ct. 2250, 101 L,Ed.2d. 40 (1988). No showing is made that Respondent Emanuel H. Stein, a private person, conspired with state officials to deprive Petitioner of his constitutional rights. United Steelworkers v. Phelps Dodge Corp., 833 F.2d 804 (9th Cir. 1987). Finally, even if Respondents' decedent had acted as Petitioner suggests, he was acting as a private attorney in his professional capacity. Such actions by private attorney are not considered actions under color of state law. Sturm v. Shrank, 43 B.R. 755 (D.C.N.Y. 1984).

The decision below, even if it addressed questions of federal law, was in accord with the interpretation of U.S. Constitution, Amendment 14, §1 and 42 U.S.C. §1983 by this Court and other Federal Courts. The Petition should be denied.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Dated May 2, 1990.

Respectfully submitted,

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